No. 78-1211

In the Supreme Court of the United States

OCTOBER TERM, 1978

LANDRUM TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 30a-31a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1978. A petition for rehearing was denied on January 5, 1979 (Pet. App. 36a). The petition for a writ of certiorari was filed on February 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's perjury could be prosecuted only under 18 U.S.C. 1623 and not under 18 U.S.C. 1621.

2. Whether the evidence was sufficient to sustain petitioner's conviction under 18 U.S.C. 1621.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner, a psychiatrist, was convicted of perjury, in violation of 18 U.S.C. 1621. The imposition of sentence was suspended and petitioner was placed on two years' probation, a special condition of which was that he provide eight hours per week of free professional services to a community mental health center. The court of appeals affirmed (Pet. App. 30a-31a).

The facts adduced at trial showed that petitioner had been introduced to David Wayne Burks, then charged with armed bank robbery, by Burks' lawyer, Bart Durham, who asked petitioner to evaluate Burks in connection with Burks' insanity defense (1 Tr. 49, 61-62, 99).[1] Petitioner conducted the evaluation and testified on Burks' behalf at Burks' trial. After Burks was convicted and sentenced to the Federal Penitentiary in Terre Haute, Indiana, he corresponded with petitioner during his incarceration, and petitioner sought Burks' transfer to the Federal Correctional Institution in Butner, North Carolina, where more extensive psychiatric help was available (1 Tr. 52, 71, 100).

On May 25, 1977, a hearing on Burks' application for bail pending appeal was held in the district court at which petitioner was the sole witness on Burks' behalf. On examination by Burks' counsel, petitioner testified that although he had testified against Burks' release on bond in a previous bond hearing, an interview with Burks that morning had persuaded him that Burks would no longer be a danger to himself or others if released on bond (2 Tr. 8-10). On cross-examination, petitioner testified that he

[1]As used here, "1 Tr." refers to the transcript of petitioner's trial held on July 5 and 8, 1977 and "2 Tr." refers to the transcript of David Wayne Burks' bail hearing held in the United States District Court for the Middle District of Tennessee on May 25, 1977.

had reached his conclusion only after interviewing Burks that day and that the last time he had spoken to Burks had been a year earlier (2 Tr. 12, 17). When the prosecutor asked whether petitioner had attempted to follow up his earlier treatment of Burks, petitioner replied that Burks had written him "a letter" requesting further treatment but that petitioner was unable to provide it (2 Tr. 14, 22). The prosecutor concluded his examination, but the court pursued the matter of the correspondence between Burks and petitioner and elicited petitioner's response that he had received three or four letters from Burks since his last interview (2 Tr. 23-25).

The prosecutor then continued his cross-examination and asked about the location of those letters (2 Tr. 25-26):

Q. Did you bring his letters with you to court here today?

A. No.

Q. Did you bring your responses to his letters here to court today?

A. No.

Q. Where are they?

A. They are in a briefcase.

Q. Where is the briefcase?

A. Its, uh, in my office.

Q. Where, what city?

A. North Carolina, Chapel Hill.

Q. Did you bring any file with you today concerning David Burks?

A. No.

Q. Did you bring any papers concerning David Burks?

A. Uh, yes, there are a few papers.

Q. May we see them, please.

A. I would have to go get them.

Q. Why are the letters in your briefcase in North Carolina?

THE WITNESS: Uhm, Your Honor, I would like to take that back. I do have the letters with me.

Q. Where are they?

THE COURT: Get them then. Let's not fool around. You didn't mean it when you said they were in North Carolina?

THE WITNESS: No, I didn't.

THE COURT: You knew they weren't in North Carolina?

THE WITNESS: That's right.

THE COURT: We will take a recess.

Thereafter, petitioner was indicted and convicted under 18 U.S.C. 1621 for testifying falsely that he had not brought Burks' letters with him to the bond hearing.

ARGUMENT

1. Petitioner's principal contention (Pet. 12-19) is that 18 U.S.C. 1623,[2] passed in 1970 as part of Title IV of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 932, completely supersedes the general

[2]18 U.S.C. 1623 provides in pertinent part:

(a)Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

perjury statute, 18 U.S.C. 1621,[3] with respect to perjury committed in "any proceeding before or ancillary to any court or grand jury of the United States" (Section 1623(a)), and that such perjury cannot be prosecuted under Section 1621. In petitioner's view, the choice of statutes is significant in this case because he claims that his recantation would have entitled him to a judgment of acquittal under Section 1623(d), whereas recantation does not bar prosecution under Section 1621, but is only relevant to the intent of the defendant to testify falsely. See *United States* v. *Norris*, 300 U.S. 564, 576 (1937); *United States* v. *Lococo*, 450 F. 2d 1196, 1198 n.2 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972).

Petitioner's claim—in essence that Section 1623 repealed Section 1621 with respect to certain types of perjury—is incorrect. As petitioner concedes (Pet. 14),

[3]18 U.S.C. 1621 provides in pertinent part:

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true;

* * * * *

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. * * *

nothing in the language or legislative history of Section 1623 indicates an intent to repeal Section 1621; indeed Congress reenacted both Sections 1621 and 1623 in 1976 (with an amendment adding certain false declarations to their coverage) without changing Section 1621's broad application to statements made under oath before any "competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered * * *." Pub. L. No. 94-550, 90 Stat. 2534.

In any event, repeal by implication is unwarranted unless there is a "clear repugnancy" (*Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 457 (1945)) between the earlier and later statutes that makes them "irreconcilable" (*Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). There is no such repugnancy between Sections 1621 and 1623 as applied to perjury committed in a federal court. As a general matter, the mere fact that two statutes overlap with respect to the conduct they punish—as many statutes do—does not demonstrate such repugnancy that only one may be held to apply to that conduct; rather selection among overlapping statutes rests in the prosecutor's discretion. See *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *United States* v. *Noveck*, 273 U.S. 202 (1927).[4] Moreover, there are significant differences between Sections 1621 and 1623 that indicate Congress'

[4] *United States* v. *Batchelder*, cert. granted, No. 78-776, Jan. 8, 1979), also involves two statutes that overlap with respect to the conduct they prohibit (possession of firearms) but that provide different maximum penalties. We contend in that case that either of those statutes (and their respective penalty provisions) may be used for firearms prosecutions, and the same arguments made in that case would apply here. There is no need, however, to hold this petition pending decision in *Batchelder*, because there are additional differences between the statutes involved in this case that rebut petitioner's claim of implied repeal. Moreover, whether two statutory provisions are irreconcilable, or indicate Congress' intent to supersede the earlier provision, depends on the particular facts of each statutory scheme.

intent that each provision have separate and independent effect. While recantation may, on certain conditions, be a bar to prosecution under Section 1623, while it would only be relevant to criminal intent under Section 1621, Section 1621 also imposes significant burdens on the prosecution that Congress eliminated for cases brought under Section 1623. Thus, in a prosecution under Section 1621 the government must prove that the statement was false, and must do so with direct evidence supported by the testimony of at least two witnesses. Under Section 1623, however, it is sufficient if the government shows that the defendant has "made two or more declarations, which are inconsistent to the degree that one of them is necessarily false [and an indictment] need not specify which declaration is false * * *." 18 U.S.C. 1623(c). Further, Section 1623(e) provides that proof need not be made "by any particular number of witnesses or by documentary or other type of evidence."

The statutory scheme thus indicates that Section 1623 was designed as an alternative means of prosecuting certain kinds of perjury that would facilitate prosecution in significant respects but at the same time would provide defendants with a means of avoiding those particular kinds of prosecutions—*i.e.*, by recanting before the proceeding is substantially affected or before the false statement has been or is about to be exposed.[5] The statutory scheme, however, does not indicate that Section 1623 was intended to repeal or displace Section 1621 as another means of prosecuting perjury before a federal court or grand jury, and the few courts that have ruled on the matter have held that it does not have that effect.[6] The

[5] Thus, Section 1623(d) expressly limits the recantation bar to prosecutions brought "under this section * * *."

[6] *United States* v. *Diggs*, 560 F. 2d 266, 269 n.3 (7th Cir.), cert. denied, 434 U.S. 925 (1977); *United States* v. *Ruggiero*, 472 F. 2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973). Other cases have

statements in the decisions relied on by petitioner are, as he acknowledges (Pet. 17-19), dicta, since the convictions in those cases were upheld.[7] In sum, petitioner was properly prosecuted under Section 1621, and there is no conflict among the circuits or other reason for this Court to review what petitioner stresses (Pet. 20, 29) is a "unique" case.

2. Petitioner also claims that even if prosecution were proper under Section 1621, the defense of recantation established by decisions under that section "would properly constitute a complete defense" (Pet. 21). That claim is unfounded.

It is well established in cases applying Section 1621 and other general perjury statutes that recantation is not a complete defense or a bar to prosecution but is merely evidence that may demonstrate the defendant's lack of intent to make the false statement in the first place. *United States* v. *Norris, supra; United States* v. *Lococo, supra; United States* v. *Kahn*, 472 F. 2d 272, 284 (2d Cir.), cert. denied, 411 U.S. 982 (1973). That issue was properly presented to the jury. The principal argument of petitioner's counsel at trial was that petitioner's recantation demonstrated a lack of intent to deceive (1 Tr. 152-

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assumed without discussion the propriety of using Section 1621 to prosecute perjury that could also be prosecuted under Section 1623. See *United States* v. *Howard*, 560 F. 2d 281 (7th Cir. 1977); *United States* v. *Masters*, 484 F. 2d 1251 (10th Cir. 1973); *United States* v. *Wesson*, 478 F. 2d 1180 (7th Cir. 1973); *United States* v. *Pollak*, 474 F. 2d 828 (2d Cir. 1973).

[7]See *United States* v. *Kahn*, 472 F. 2d 272, 283 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States* v. *Lardieri*, 497 F. 2d 317, 320 n.6 (3d Cir. 1974). *United States* v. *Devitt*, 499 F. 2d 135, 139 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975), on which petitioner relies (Pet. 18-19), expressly rejected the claim that the government was restricted in its choice of sections, and its statement that the government "would be expected to proceed under § 1623" was not intended to suggest any such limitation, as the Seventh Circuit's later opinion in *United States* v. *Diggs, supra*, makes clear.

157), and the trial court properly instructed the jury that intent to testify falsely "may be determined from all of the facts and circumstances surrounding the case" and that the jury "may consider any statement made and done or omitted by the defendant and all other facts and circumstances in evidence which indicate a state of mind" (1 Tr. 183; see also 1 Tr. 189).[8] The jury, however, rejected petitioner's factual contention, which is not surprising in view of the fact that petitioner at the bond hearing freely admitted that he had knowingly misstated the whereabouts of the letters from Burks because he did not want to disclose certain matters relating to the letters (2 Tr. 26-28).

3. Petitioner finally contends (Pet. 24-28) that the court of appeals affirmed his conviction on an erroneous theory. Whether that is so is a close question, but the fact that the court of appeals may have relied on the wrong reasons to reach the correct result is not a reason for overturning its judgment. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

In its judgment order, the court of appeals rejected petitioner's claim that he should have been entitled to the recantation defense provided by Section 1623(d), stating (Pet. App. 31a): "Assuming, without deciding, that such a defense may be appropriate under §1621, we nonetheless find on this record that the defense of recantation is rebutted by the fact that while recantation occurred quickly, it also occurred under a threat that made it manifest that the falsity would be exposed." Petitioner argues that the court's reasoning was wrong because the

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[8]The district court properly rejected (1 Tr. 190) petitioner's requested instruction that "willingness to correct a misstatement though no[t] ordinarily a defense to a perjury prosecution is potent to negative willful intent to swear falsely," on the ground that the "potency" of such evidence is a matter for the jury. See also *United States* v. *Kahn, supra*, 472 F. 2d at 284. The court instead reiterated its instruction that the jury could determine intent on the basis of all the facts and circumstances of the case (1 Tr. 189).

record does not show that he recanted only after it was manifest that he had testified falsely; because that question was not presented to the jury in any event; and because the court ignored the alternative provision of Section 1623(d) arguably barring prosecution after a recantation if the false declaration "has not substantially affected the proceeding."

Petitioner's first two arguments assume that whether the falsity was manifest is a jury question. However, since Section 1623(d) provides that certain recantations "shall bar prosecution under this section," whether a recantation satisfies the statutory standards would seem to be a question of law for the court, not a question of fact for the jury, and at least one court has so held. *United States* v. *Kahn, supra,* 472 F. 2d at 283 n.9. Under that view, it was not error for the court of appeals to hold, as a matter of law, that the recantation occurred after it had become manifest that the falsity was about to be exposed, since the record supports the reasonableness of that conclusion.[9]

The court of appeals did not consider whether the false declaration had "substantially affected the proceeding" before it was recanted, and it is not clear whether Section 1623(d) intended the failure of a false statement substantially to affect a proceeding to constitute an alternative ground for barring prosecution under that section whenever there has been a recantation. The disjunctive "or" in the statute supports petitioner's

[9]The legislative history of Section 1623 does not indicate whether the recantation conditions of subsection (d) were intended to be questions for the court or jury. The fact that the question may require resolution of factual issues does not necessarily make it a jury question. For example, it has been consistently held that the question of the materiality of false statements is a question of law for the court, even though it may turn on the resolution of disputed factual issues. See, *e.g., United States* v. *Anfield,* 539 F. 2d 674 (9th Cir. 1976).

argument; but the structure and purpose of the recantation provision would bar prosecution only if the false declaration had not substantially affected the proceeding and if the falsity had not become manifest. Cf. *United States* v. *Kahn, supra,* 472 F. 2d at 283-284; *United States* v. *Del Toro,* 513 F. 2d 656, 665 (2d Cir.), cert. denied, 423 U.S. 826 (1975).[10] It is not necessary to reach that question in this case, however, since petitioner was properly prosecuted under Section 1621, and recantation is not a bar to prosecution pursuant to that section under any circumstances.[11]

[10]As the court stated in *United States* v. *Del Toro, supra,* 513 F. 2d at 665, the purpose of Section 1623(d) "was obviously to induce the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution for doing so." Under petitioner's construction, however, prosecution would be barred in cases where a witness blatantly lied to a court or grand jury with intent to deceive, was immediately confronted with evidence contrary to his statement, and for that reason alone admitted that he had lied. That construction would not serve the purpose of encouraging witnesses voluntarily to correct their false statements but would simply provide a windfall to witnesses whose perjury was quickly exposed.

[11]There is no merit to petitioner's further contention (Pet. 22-23) that the hearing on Burks' bond application was moot and that petitioner could not be charged with perjury for testifying falsely in a moot proceeding. In fact the bond proceeding was not moot (see *Ginyard* v. *Clemmer,* 357 F. 2d 291, 292 (D.C. Cir. 1966), and in any event petitioner cites no authority for the proposition that the existence of some other warrant against a bail applicant deprives a court of jurisdiction over the application, or immunizes witnesses in hearings on such applications from the penalties of perjury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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